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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1929.

WILLIAM J. STRATTON, Secretary of the State of Illinois,
Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
a Corporation,
Appellee.

Appeal from the United States Circuit Court of Appeals
for the Seventh Circuit.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEE.

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INDEX.

	Page
Statement of the case	1
Brief	7
Argument	7
The theory and fundamental basis of the Illinois Franchise Tax Statutes is to require all corporations to pay an annual franchise tax of 5 cents per $100.00 on that part of its issued capital stock represented by property owned and business done in Illinois	12
The question involved in this case	15
As to appellee the tax of one thousand ($1,000.00) dollars resulting from the application, under the proviso of section 105 of the scale of minimum amounts provided by Section 107 of the General Corporation Act, is void, being a direct, as well as unreasonable, burden on the interstate commerce engaged in by it	16
Appellee is likewise deprived of its property without due process of law, within the inhibition of the Fourteenth Amendment	20
Sections 105-107 of the Illinois Corporation Act, on their face, as well as in the application, act to deprive appellee of the equal protection of the laws	22
General Railway Signal Co. v. Virginia, and similar cases—distinguished	33
The United States Circuit Court of Appeals did not misconceive the nature and effect of the tax	40
Appendix A—Sections from Chapter 32, Cahill's Revised Statutes 1927; Chapter 32, Smith-Hurd Revised Statutes 1927	43

Section 80 43
Section 81 43
Section 92. 45
Section 94 46
Section 96 47
Section 101 48
Section 102 49
Section 105 50
Section 106 53
Section 107 54
Section 108 55
Section 109 55
Section 112 55
Section 113 56
Section 114 56
Section 115 56
Section 116 57
Section 128 58
Section 129 58
Section 130 59

Authorities Cited.

Air-Way Electric Co. v. Day, 266 U. S. 71..7, 8, 9, 11, 18, 22
Alpha Portland Cement Co. v. Mass., 268 U. S. 212, Op. 218 19
American Can Co. v. Emmerson, 288 U. S. 297..... 39
A. T. & S. F. Ry. v. O'Connor, 223 U. S. 280.....8, 21
Armstrong v. Emmerson, 300 Ill. 54, at 64.....10, 13, 39
Cheney Bros. v. Mass., 246 U. S. 147..... 37
Chicago I. & L. Ry. Co. v. Hatchett, 228 U. S. 559.... 34
Cudahy Packing Co. v. Hinkle, 278 U. S. 460.....7, 8, 22
Frost v. R. R. Comm., 271 U. S. 591, 593-4, 599..... 10
General Ry. Signal Co. v. Va., 246 U. S. 500.....9, 19, 33

Hanover Fire Ins. Co. v. Carr, 272 U. S. 494...9, 10, 14, 31
Hump Hair Pin Mfg. Co. v. Emmerson, 258 Ill. 290.. 38
Hump Hair Pin Co. v. Emmerson, 293 Ill. 389..... 39
International Paper Co. v. Mass., 246 U. S. 135.....7, 22
International Shoe Co. v. Shartel, ... U. S. ...., 73 L. Ed. 411, at 413.....10, 33
James W. Lusk, Receiver, v. Botkin, 240 U. S. 230.... 34
K. C. Ft. Scott & M. R. R. v. Kansas ex rel. Botkin, 240 U. S. 227.....9, 37
K. C. M. & B. R. R. v. Stiles, 242 U. S. 111.....9, 38
Looney v. Crane Co., 245 U. S. 178.....7, 8, 10, 22, 31
Ludwig v. Western Union Tel. Co., 216 U. S. 146 .....7, 8, 14, 21
New York, L. & E. R. R. v. Penn, 153 U. S. 628..... 20
O'Gara Coal Co. v. Emmerson, 326 Ill. 18, at 32..11, 22, 26
Ozark Pipe Line Corp. v. Monier, 255 U. S. 561, Op. 565 19
People of State of New York v. Latrobe, ... U. S. ...., 73 L. Ed. 407..... 9
Peck v. Lowe, 247 U. S. 165..... 39
Pullman Co. v. Kansas, 216 U. S. 56..... 10
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50 .....9, 11, 34
Royster Guano Co. v. Virginia, 253 U. S. 412.....9, 23, 29
Southern Ry. Co. v. Greene, 216 U. S. 400.....9, 22, 30
St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 L. Ed. 192 20
Tappan v. Merchants Natl. Bank, 19 Wall. 490..... 20
Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 191 39
U. S. Glue Co. v. Oak Creek, 247 U. S. 321..... 39
Western Union v. Kansas, 216 U. S. 1, Op. ...., 54 L. Ed. 374 .....7, 8, 10, 14, 16

No. 98.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1929.

WILLIAM J. STRATTON, Secretary of the State of Illinois,
Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
a Corporation,
Appellee.

Appeal from the United States Circuit Court of Appeals
for the Seventh Circuit.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF THE CASE.

May It Please the Court:

This case, under the title of St. Louis Southwestern Railway Company, appellant, v. Louis L. Emmerson (the predecessor in office of W. J. Stratton), Secretary of State of the State of Illinois, is reported in 30 Federal (2d) 322 (C. C. A.) and 27 Federal (2d) 1005 (D. C.).

Appellant correctly states the facts, but in order that the inapplicability of the authorities relied on by appellant may be made the more apparent, a more detailed explanation of the pertinent provisions of the Illinois Corporation Act (which are set out in full under Appendix A) is necessary.

All references to the sections of the statute are to Chapter 32, Cahill's Revised Statutes Illinois 1927, and Chapter 32 of Smith-Hurd's Revised Statutes Illinois 1927. The sections have the same numbers in each statute.

The State of Illinois exacts, and, at the time this controversy arose, exacted, from domestic corporations (Sec. 96) an "initial" (incorporation) fee, but once paid on its stock as issued, and also an **annual** franchise tax for the remainder of the first year (Sec. 129) and yearly thereafter (Secs. 105-107).

Section 80 provides that every foreign corporation shall, "before it transacts any business or maintains an office in this state, procure a certificate of authority therefor from the Secretary of State."

Section 81 provides the form of such application in the manner of a questionnaire covering information from which the Secretary of State may compute the proportion of its capital stock which will be represented in Illinois during the remainder of the first calendar year of its admission by the corporation's estimate of its business to be done within and property to be brought into the state during that period, and by a like estimate of its business and property in other states during the same period.

Section 101 provides for an admission tax (the complement of the "initial" or incorporation fee charged domestic corporations by section 96), requiring a foreign corporation to pay for a "certificate of authority to do business in Illinois, the same fees provided by this to be paid by a similar corporation incorporated under the laws of this state. * * * All such fees shall be based upon the proportion of its issued capital stock represented by business transacted and property located in Illinois."

In addition to the admission tax of the foreign corporation, a franchise tax is exacted of it, covering the remainder of the first year of its admission (Sec. 129), based on the proportion of its issued capital stock represented in Illinois, as determined by the estimate stated in the application, pursuant to section 81.

Having admitted foreign corporation, as a quasi citizen, into the state, the State of Illinois requires both foreign and domestic to file an annual report; section 102 providing that

> "Each corporation, including railroads, domestic and foreign, * * * shall make a report in writing to the Secretary of State between the first day of February and the first day of March of each year on the forms to be prescribed and furnished by the Secretary of State. That part of the annual report relating to property and business shall be made as for the calendar year ending December 31st preceding. * * * **Such annual report shall also disclose such facts as are necessary to enable the Secretary of State**

to ascertain the proportion of its capital stock represented by business transacted and tangible property located in this state and such other information as may be necessary or appropriate in order to assess the annual license fee or franchise tax." * * *

On the basis of the annual reports filed by foreign and domestic corporations the Secretary of State of Illinois is required to determine the proportion of the capital stock represented by "business transacted and property located" in the state.

Section 106 provides that, "In ascertaining the amount of the issued capital stock represented by business transacted and property located in this state, the sum of the business of any foreign or domestic corporation transacted in this state and the total property of such corporation located within this state shall be divided by the sum of the total business of the corporation and the total property of the corporation wherever situated."

Having determined the amount of capital stock of each foreign and domestic corporation—so represented in Illinois, the Secretary of State computes their annual franchise taxes as is provided by paragraphs 105 and 107 of the statute and as set forth in appellant's brief.

It might be further noted that the bill avers and the statute provides that on the failure of a corporation to pay the annual franchise tax the Secretary of State could and would forfeit the right of such corporation to do business in Illinois (Sec. 92). The statute provided for

divers penalties, against the corporation and its officers, account their failure to comply with the statute (Sec. 114) (Rec., p. 5).

The annual report on which the tax in question was based was filed, as required by the statute (Sec. 102), in February, 1927, and covered property owned and business done in the state during the calendar year of 1926.

The statute (Sec. 112) provided that between the 1st day of February and 15th day of June the Secretary of State should mail a notice to each corporation, notifying it of the amount assessed against it for the ensuing year; and in this case, for the year beginning July 1, 1927, and ending June 30, 1928.

The statute under which this cause arises was amended by act approved May 12, 1927, and effective that date, an emergency having been declared (Rec., p. 25) (Illinois Laws 1917, pages 359-360) because the prior statute had been declared unconstitutional.

> See O'Gara Coal Co. (Beatrice Creamery Co., No. 18177) v. Emmerson, 326 Ill. 18 at 44.

Appellee contended in the District Court (Rec., p. 30), in the Circuit Court of Appeals (Rec., p. 40) and here contends, that, as applied to it, under the facts pleaded, paragraphs 105 and/or 107 of the Illinois Corporation Act are void, in that they take from appellee rights guaranteed to it by the Constitution of the United States:

1. Unreasonably burdening and directly taxing appellee's commerce between the states in violation of Section 10 of Article I of the Constitution of the United States.

2. Taxing appellee's property and business outside the State of Illinois, and thereby depriving appellee of its property without due process, contrary to the Fourteenth Amendment to the Constitution of the United States.

3. Discriminating against appellee in favor of other foreign and domestic corporations, thereby denying it the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

BRIEF.

I.

As to appellant, the tax of one thousand ($1,000.00) dollars resulting from the application under the proviso of section 105 of the scale of minimum amounts of tax provided by Section 107 of the General Corporation Act is void, being a direct, as well as an unreasonable, burden on the interstate commerce engaged in by appellee, in that the annual franchise tax exacted of appellee on that portion of its issued capital represented in Illinois and amounting to $135.21 is the maximum which can be exacted of it on that part of its capital stock so represented in Illinois and when the appellant assessed an additional tax of $864.79; such additional amount necessarily fell partly on the interstate business conducted by appellee and amounted to a direct tax and an unreasonable burden on appellee's commerce between the states.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Ludwig v. Western Union Tel. Co., 216 U. S. 146;
Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Air-Way Electric Co. v. Day, 266 U. S. 71;
Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

II.

Appellee is likewise deprived of its property without due process of law, within the inhibition of the Fourteenth

Amendment, because when computed on the basis of the portion of appellee's issued capital stock represented by property and business in Illinois, the franchise tax would amount to $135.21, and when appellant assessed a tax of $864.79 in addition thereto, such additional assessment fell on appellee's capital stock, which represented its property in other states, and amounted to an unlawful tax upon appellee's property in other states.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Ludwig v. Western Union Tel. Co., 216 U. S. 146;
A. T. & S. F. Ry. v. O'Connor, 223 U. S. 280;
Looney v. Crane Co., 245 U. S. 178;
Air-Way Elec. App. Corp. v. Day, 266 U. S. 71;
Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

III.

As applied to appellee, Pars. 105 to 107 of the Illinois Corporation Act deny it the equal protection of the laws, discriminating against it and in favor of other domestic and foreign corporations having like business and assets in Illinois, but a smaller amount of issued capital stock.

IV.

As to a corporation of its own creation, the state may impose any tax upon its franchise to be a corporation which the state desires, even though the corporation is engaged in interstate commerce, as in such a case the tax is not upon interstate commerce, but upon the privilege

of existing and doing business as a corporation, which the state has authority to tax by the measure of its capital stock, which, in part, may represent property or business not subject to the state's taxing power.

Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
K. C. M. & B. R. R. v. Stiles, 242 U. S. 111;
K. C. Ft. Scott & M. R. R. v. Kansas ex rel. Botkin, 240 U. S. 227.

The franchise tax involved in this appeal is also much different than an incorporation fee exacted of a domestic corporation or its complement, an admission or "initial" fee exacted by the state from foreign corporations seeking admittance (there being but one collection of the tax), as to which different rules apply.

Hanover Ins. Co. v. Harding, 272 U. S. 494;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
People of State of New York v. Latrobe, ... U. S ..., 73 L. Ed. 407.

Authorities, cited by appellant, which are distinguishable on the foregoing grounds, are:

General Ry. Signal Co. v. Va., 246 U. S. 500;
K. C., Ft. Scott & M. R. R. v. Kansas ex rel: Botkin, 240 U. S. 227;
K. D. M. & B. R. R. v. Stiles, 242 U. S. 111;
Air-Way Elec. Appliance Co. v. Day, 266 U. S. 71;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
Southern Ry. Co. v. Greene, 216 U. S. 400;
Royster Guano Co. v. Virginia, 253 U. S. 412.

As applied to appellee, the statute violates the Equal Protection clause, because the tax is not limited to that part of appellee's capital stock justly apportionable to the State of Illinois. (See International Shoe Co. v. Shartel, ... U. S. ..., 73 L. Ed. 411, 413.)

A franchise tax against a foreign corporation and method of fixing the same must bear a reasonable relation to the value of the privilege granted.

Air-Way Elec. v. Day, supra.

Although having power to exclude foreign corporations, a state cannot limit entry on condition that such corporations waive any of their constitutional rights.

Looney v. Crane, 245 U. S. 178, Op. 187-8;
Western Union v. Kansas, 216 U. S. 1, Op. 47-8;
Pullman Co. v. Kansas, 216 U. S. 56, Op. 63-4;
Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, Op. 507;
Frost v. R. R. Comm., 271 U. S. 591, at 593-4, 599.

The Illinois Supreme Court has announced that the purpose of Section 105 of the General Corporation Act of Illinois is to exact an annual license fee or charge from foreign corporations "for the privilege of doing business in the State of Illinois, based upon the proportion of their capital stock represented by their property and business in this state."

Armstrong v. Emmerson, 300 Ill. 54 at 64.

Appellant's authority to issue stock or the number of shares it may have issued and outstanding does not depend upon the laws of Illinois. Its sole authority in that respect depends upon the laws of Missouri, under which it was created.

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18 at 32.

ARGUMENT.

I.

The theory and fundamental basis of the Illinois Franchise Tax Statutes is to require all corporations to pay an annual franchise tax of 5 cents per $100.00 on that part of its issued capital stock represented by property owned and business done in Illinois.

Section 101 of the Illinois Corporation Act provides that:

> "All (the annual franchise fees were included) such fees shall be based upon the proportions of its issued stock represented by business transacted and property located in Illinois."

Section 102 provides for an annual report which will disclose

> "such facts as are necessary to enable the Secretary of State to ascertain the proportion of its capital stock represented by business transacted and tangible property located in this state, and such other information as may be necessary or appropriate in order to assess the annual license fee or franchise tax."

The Illinois Supreme Court has announced that the purpose of the General Corporation Act of Illinois is to exact an annual license fee or charge from foreign corporations "for the privilege of doing business in the State of Illi-

nois, based upon the proportion of their capital stock represented by their property and business in this state."

Armstrong v. Emmerson, 300 Ill. 54, at 64.

The scale of **minimums** of section 107 on its face applies only to corporations without either capital assets or business in the State of Illinois. Clearly such corporations (if foreign) must be regarded as being in the state without necessity or purpose. Having no property or business in the state, there would be nothing, to defend which constitutional guarantees could attach.* Indeed, one of the grounds of revoking the authority of a foreign corporation to do business in Illinois is:

"If such corporation is transacting no business in Illinois and has no tangible property in this state."

Ch. 32, Sec. 92 (2) Cahill's Revised Statutes 1927.

The proviso of section 105, requiring all corporations to at least pay the scale of minimums set forth in section 107, is clearly of a secondary nature, and, as applied to appellee, in conflict with the fundamental theory of the statute.

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*Such corporations would not be in a position to raise the question as one who challenges the validity of a state statute, at least as violating the equal-protection clause, cannot rely on theoretical inequalities or such inequalities as do not affect him.

Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50, 54-5 (citing Western Union Tel. Co. v. Atty.-Gen., 125 U. S. 530, 552-3; Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55-60);

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 121.

We say that the actual effect as applied to appellee of Sections 105 and 107 of the Illinois Statutes is as follows:

The State of Illinois has fixed a fair and reasonable measure of the value to foreign corporations (which have been admitted and have become quasi citizens of the state) of their right to carry on business in the state, viz.: The portion of their issued capital stocks represented in Illinois by property and business in the state; and the State of Illinois has fixed a tax of one-twentieth of 1 per cent on such portion of the issued capital stock, so represented in Illinois (section 105), but to certain corporations, including appellee, who happen to possess but little business and property in the state, but happen to have a large issued capital stock, the state arbitrarily says: "You must pay more" (sections 105-107).

In determining the actual effect and substance of the statutes, the form is to be disregarded. The actual results following its application control it.

> "The controlling test is to be found in the operation and effect of the law as applied and enforced by the state" (Op. 510).

See

> Hanover Fire Ins. Co. v. Carr, 272 U. S. 494;
> Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30;
> Ludwig v. Western Union Tel. Co., 216 U. S. 146.

II.

The Question Involved in This Case.

The question involved in this case is really not (as stated by appellant, p. 11 of Argument) "whether or not the state may require a corporation organized or admitted to do business in the state to pay a minimum fee or franchise tax, as provided in sections 105 or 107, for granting the privilege to it of doing business in the state, during the year, although it may not actually exercise its franchise in the state to a sufficient extent to produce such amount of tax, at the rate specified in section 105," but is

May the state, having admitted a foreign corporation as a quasi citizen to do business within its boundaries, levy an annual franchise tax on the basis of its issued stock, in excess of that portion thereof actually represented by property and business in the state? and

May the state discriminate between domestic and foreign corporations to the extent that it may require foreign corporations, with large issued capital (but a small portion of which is represented in Illinois), to pay a larger franchise tax, based on a scale of minimums, while requiring other corporations of smaller capital to pay on the basis of that portion of their capital stock apportioned to the state on the portion of property owned and business done in the state?

May the State of Illinois require foreign corporations (which it has admitted) with large issued capitalizations,

to thereafter bring a fixed amount of their assets and business into the state or else pay a large franchise tax, the same as if such foreign corporations had brought such fixed amount of their capital and business into the state?

III.

As to Appellee the Tax of One Thousand ($1,000.00) Dollars Resulting From the Application, Under the Proviso of Section 105 of the Scale of Minimum Amounts Provided by Section 107 of the General Corporation Act, Is Void, Being a Direct, as Well as Unreasonable, Burden On the Interstate Commerce Engaged in by It.

By virtue of clause 3 of Section 8 of Article I of the Constitution the State of Illinois is prohibited from laying any direct or unreasonable tax on interstate commerce.

The prohibition was first considered with reference to a franchise tax in the case of Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 423, where the Court specifically held void, as being in violation of the commerce clause, a Kansas statute requiring foreign corporations (before that time admitted to intrastate business) to pay as a franchise tax a fixed (one-tenth of 1 per cent) per cent of their authorized capitals. The Supreme Court reasoned that as the whole of the capital stock represented the whole of the corporation's business, and as only a part of the corporation's capital, property and business was in Kansas, the tax on all of its capital stock was, of necessity,

a tax on all of its property and all of its business, which included its interstate business; by reason whereof the tax was in part a direct burden, a direct tax, on the corporation's business in interstate commerce, and therefore void. It is only where the burden is indirect or incidental that the commerce clause would not be violated unless the burden be unreasonable.

Here, as in the Western Union Co. case, the tax is a direct burden on the interstate commerce conducted by appellee, because one hundred thirty-five and 21/100 ($135.21) dollars is the tax which would be due from appellee on the proportion of its capital stock represented by property owned and business done in Illinois. The balance of its capital stock is represented by property and business in other states. The appellee demands eight hundred sixty-four and 79/100 ($864.79) dollars additional. If paid, then, of necessity, it is a tax and a direct burden upon all of appellant's property and business, including appellant's interstate commerce, and it is therefore void.

The case of Air-Way Electric Appliance Co. v. Day involved franchise tax based on the portion of the authorized stock of a foreign corporation (only a part of which was issued), represented by property owned and business done in the taxing state. It was held that the tax based on the authorized but unissued stock, of necessity, fell, in part, on issued stock which represented commerce between the states carried on by the corporation.

"As some of the outstanding shares are represented by plaintiff's interstate business the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business, including the interstate commerce, of the plaintiff (International Paper Co. v. Massachusetts, supra, 142). We hold that the act violates the commerce clause."

Air-Way Electric Appliance Corp. v. Day, Op. 226 U. S. 71.

The actual effect of sections 105-107 of the Illinois statute is the same as the actual effect of the Ohio statute. The body of section 105 fixes a tax on the basis of property owned and business done in Illinois. The proviso of section 105 singles out a class of corporations (including appellee) and places an additional burden and tax on them—the scale of minimums provided by section 107. This additional burden and tax must, in part, fall on and directly burden appellee's commerce between the states.

If the State of Illinois had levied a tax based on the authorized stock of appellee (a part of which is unissued), it would be void. If the tax was based on any part (but not all) of the authorized but unissued stock, we do not believe the Court would have any hesitancy in declaring it to be void. Here, the tax is based, first, upon appellee's issued stock represented in Illinois, and then an additional amount is arbitrarily added thereto. There is no difference, in substance, between the decided cases and this.

After admission of a foreign corporation the state cannot impose an annual franchise tax, where the sole business conducted by the corporation within the confines of the state was in interstate commerce.

Ozark Pipe Line Corp. v. Monier, 266 U. S. 561, Op. 565;
Alpha Portland Cement Co. v. Mass., 268 U. S. 212, Op. 218.

Appellant relies mainly on the case of General Railway Signal Co. v. Virginia, 246 U. S. 500. That case is not in point as is fully demonstrated under VI infra (p. 32.). That case involves an admission, not a franchise, tax, as to which different principles govern. The Virginia statute fixed a scale of **maximum** taxes, which, on the authority of Baltic Mining Co. v. Mass., 231 U. S. 68, was held to save it, as the scale acted to **decrease** or limit the tax in amount.

Section 107 of the Illinois act provides for a scale of **minimum taxes**, acting to **increase** the tax which appellee would otherwise pay on the basis of property owned and business done.

In the General Railway Signal case it was contended that the tax unreasonably burdened interstate commerce. In sustaining the statute, this Court remarked:

"It seems proper, however, to add that the case is on the border line" (Op. 511).

If the Virginia case is "on the border line" as to whether the tax was an unreasonable burden (it was not a direct burden on interstate commerce because, as [1] it did not vary in direct proportion to the amount of stock, and [2] had a limited maximum), then, by reason of the fact that there is a true and fair measure provided by the Illinois statute and available for the computation of the tax, and the further fact that the scale of minimums acts to increase, instead of decreasing, the tax, this case goes over the "border line" into the realm of the unreasonable and is void.

IV.

Appellee Is Likewise Deprived of Its Property Without Due Process of Law, Within the Inhibition of the Fourteenth Amendment.

It is the old and well-established rule that a state cannot, consistent with the due-process clause, levy a tax on property without its territorial limits.

St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 L. ed. 192;
New York, L. & E. R. R. v. Penn., 153 U. S. 628, 14 Sup. Ct. 952, 38 L. ed. 846;
Tappan v. Merchants Natl. Bank, 19 Wall. 490, 22 L. ed. 189.

The rule was first applied to a corporation franchise tax in the case of Western Union Tel. Co. v. Kansas, 30 Sup. Ct. R. 190, 54 L. ed. 355, where the Court held void a

Kansas statute requiring foreign corporations, which had been admitted to do business in Kansas, as a condition of continuing to do a local business to pay a fixed (one-tenth of 1 per cent) per cent of their authorized capitals. Domestic corporations were required to pay the same fees. The statute was held to deprive the Western Union Tel. Co. of property without due process of law. The Court properly reasoned that the corporation's capital stock represented all of its property situated in other states, as well as in Kansas, and hence, a tax based on all of the capital stock was a tax on property located in all such states, violating the due-process clause.

So here, as the Illinois statute is applied to appellee, its property located without the State of Illinois is subjected to an Illinois tax. For appellee's tax, based on the proportion of its issued stock, represented by property and business in Illinois, would be one hundred thirty-five and 21/100 ($135.21) dollars. That sum would be the amount of tax on appellee's property and business in Illinois. The State of Illinois demands eight hundred sixty-four and 79/100 ($864.79) dollars more. Such additional exaction must necessarily fall on that portion of appellee's stock which represents its business and property, located elsewhere, and the tax is void under the due-process clause.

The theory of the case of Western Union Tel. Co. v. Kansas has been reaffirmed and applied in

Ludwig v. Western Union Tel. Co., 216 U. S. 146;
A. T. & S. F. Ry. v. O'Connor, 223 U. S. 280;

Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Air-Way Elec. App. Corp. v. Day, 266 U. S. 71;
Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

V.

Sections 105-107 of the Illinois Corporation Act, On Their Face, as Well as in the Application, Act to Deprive Appellee of the Equal Protection of the Laws.

The Circuit Court of Appeals did not find it necessary, in its opinion, to mention the third, and, we believe, the strongest, ground upon which appellee assailed the Illinois statute.

As applied to annual franchise taxes, it has been specifically held that a state cannot consistently, with the equal protection of the laws clause, discriminate in any way:

(a) Between foreign corporations of the same class, which it has admitted into the state.

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71, 71 Sup. Ct. R. 85, 69 L. ed. 10;
Hanover Ins. Co. v. Carr, supra, Op. 514;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18, at 32.

(b) Discriminate, in any way, against such foreign, and in favor of domestic, corporations.

Southern Ry. Co. v. Greene, 216 U. S. 400, 418, 54 L. ed. 536-542.

(c) Nor between domestic corporations.

Royster Guano Co. v. Virginia, 253 U. S. 412.

And any annual franchise or privilege tax (assuming it is not discriminatory), exacted of foreign corporations, must have a reasonable relationship to the value of the privilege granted.

Air-Way Electric Co. v. Day, 266 U. S. 71, 71 Sup. Ct. R. 85, 69 L. ed. 10, at 13.

The statute, on its face, as well as by its application to appellee, discriminates against appellee and in favor of other corporations, foreign and domestic, who are assessed and pay a franchise tax of 5 cents per $100 on that portion of their issued capital stock represented by property and business in Illinois.

Even though the effect of the statute be treated as contended by appellant, an apparent discrimination against appellee exists.

Appellant says that the amount of issued stock bears a fair relation to value of the annual franchise to do business. This may be so. But the ratio of property owned and business annually done bears a more true relation to the value of the franchise, and the state discriminates against appellee by taxing some corporations on the one basis (the one having a real direct and more true relation to the value of the privilege) and taxing appellee a propor-

tionately greater amount on a more remote, arbitrary and less true basis.

On its face, therefore, the statute is discriminatory because it fixed two "bases" for a franchise tax, which, when applied, assess taxes in different amounts, acting more favorably towards some corporations and less favorably towards others, including appellee.

We say, to justify this statute, appellee must be in receipt **from the State of Illinois** of some actual and substantial privilege or advantage which other corporations, paying less or proportionately less, do not receive. No such benefit has been suggested by appellant.

Not only do the statutes on their face discriminate against appellee, but, in their application, appellee is discriminated against.

The Chancellor correctly outlines the basis of the discrimination when he says:

> "Plaintiff complains that it is discriminated against because another corporation with an issued capital stock of $270,423.00, and having all of its property and business in Illinois, would be required to pay a tax of but $135.21, yet the State of Illinois insists upon plaintiff paying a sum of $1,000.00 for doing the same amount of business and having the same amount of property in the State of Illinois. It similarly complains because another corporation, with a capital stock of $1,000,000.00, and $270,423.00 of that capital represented in Illinois, would pay only $135.21, while plaintiff is required to pay $1,000.00" (Rec., p. 36).

The Chancellor then says that appellee is not discriminated against, in effect, because all corporations with the same issued stock as it, and, having the same property and business in Illinois as it, would pay the same tax; and that if appellee had issued stock in a smaller amount it would not be compelled to pay any greater tax than the smaller corporation (Rec., p. 36).

In effect, this amounts to saying: "It is true, the State discriminates against you, but you cannot complain, as the State also discriminates against every corporation which has a large issued capital and a small business in Illinois." This is not a sound answer to the charge. The fact that others are wronged does not make right the wrong done appellee.

We say the Illinois statute here involved clearly discriminates against appellee and in favor of corporations, domestic and foreign, who pay franchise taxes on the basis of the portion of their issued capital, represented by property and business in Illinois.

Is there any fair basis or justification for this discrimination?

What benefit or privilege, desired or sought by appellee, does it receive from the State of Illinois which all other foreign corporations do not also receive?

Appellee's right to be a corporation with authority to issue a certain amount of capital stock, to engage in a certain business, and its invested powers, are all granted to it by Missouri, the state of its incorporation.

"The state, which grants the franchise to be a corporation and authority to issue capital stock, may charge the corporation with an initial fee and an annual franchise tax upon the amount of the capital stock which it grants authority to issue, but it cannot charge a foreign corporation with such fee or tax for the privilege of transacting business within the state based upon its authorized capital. The authority of the foreign corporation to issue stock or the amount of stock it may have outstanding, does not depend upon the laws of Illinois, but upon the laws of the state in which it was organized."

O'Gara Coal Co. v. Emmerson, 326 Ill. 18 (Op. 32).

The sole right which appellee seeks from or receives from the State of Illinois is to enter that state and do a local business.

Notwithstanding the fact that most foreign corporations pay for the privilege of doing a local business on the basis of the portions of their issued capital represented in Illinois—appellee is asked to pay on a different basis—and in justification of such added exaction, it is said that appellee "had the privilege of increasing the amount of its property and business during the next year without paying any additional tax" (Appellant's Brief, p. 16).

To begin with, such is not the effect of the Illinois statute; and, furthermore, the state cannot, as a condition of admission or the continuance thereof, discriminate between foreign corporations with different amounts of issued capital stock, so as to require those of large capital

to bring more of their property and business than they need or desire within the state; or pay a large tax, based on the assumption that they have, will or may bring in such additional property and business.

As pointed out in the statement (pp. 4, 5, ante) the tax in question is based on appellee's annual report of property owned and business done in the calendar year 1926.

The tax is levied for the privilege of doing a local business during the year beginning July 1, 1927, and ending June 30, 1928.

Clearly then, if during the calendar year of 1927, or during the year July 1, 1927, to June 30, 1928, appellee should bring additional property and business into Illinois, it would have no relation to or in anywise be attributable to its payment of the tax here involved. Such subsequent importation of capital and business would only have effect by increasing its tax for the following years.

Once admitted, the amount of issued capital does not bear such a fair relation to the value of the right to do a local business as to justify or permit the application of the amount of such stock as the measure of the annual franchise tax, especially when the state has also provided a more fair and equitable measure by the portion of the issued stock represented by property owned and business done in the state.

Appellant urges that the Illinois statutes are intended to impose only a "reasonable minimum charge upon all corporations, both foreign and domestic, for maintaining

the privilege granted of doing a local business in the state during the next ensuing year" (Argument, p. 21).

A "minimum charge" is often permitted to cover the cost of bookkeeping, collection of tax and the administration of the act. It is usually a nominal amount. It could not reasonably vary according to the issued capitals of the franchise taxpaying corporations. As indicated by section 107 of the statute, this minimum tax should not be over $10.00, that being the minimum amount payable by a corporation having a capital stock of less than $50,000.00.

It is pleaded in the bill of complaint that appellee is an interstate carrier by railroad, subject to and operating under the provisions of the Transportation Act (Rec., p. 3). It cannot abandon its properties in Illinois and cease their operation without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission.

It cannot build or acquire other properties in Illinois without first securing a certificate of convenience and necessity from the Interstate Commerce Commission. It operates a railroad property located in a number of states and must unavoidably have a large issued capital stock, only a portion of which it can employ in Illinois. We insist that as to all corporations, and particularly as to corporations in appellee's situation, the right to do a local business in Illinois has no value beyond the actual use thereof, which the recipient can or desires to make. To say that the State of Illinois may require such a foreign corpora-

tion to pay a franchise tax actually based on a greater part of its issued capital than is actually represented by property and business in the state, or on a greater proportion (than that represented by property and business) of its issued capital than it can or desires to bring into the state, or else pay a franchise tax based upon such portion of its capital falls flat of its own absurdity.

This difference of treatment cannot be justified as resulting from a proper classification.

> "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this Court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy" (Op. 415).
>
> "It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect, and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design" (Op. 416).
>
> Royster Guano Co. v. Virginia, 253 U. S. 412.

"It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed, and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

Southern R. Co. v. Greene, 216 U. S. 415, Op. 417.

Without doubt, a state may deny all foreign corporations the right to enter its domain and do a local business, but once it does admit them, then they become quasi citizens and no right guaranteed to them by the Constitution of the United States may be infringed upon.

"In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether

such a charge violates the equal-protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state, and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment, but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind" (Op. 510).

Hanover Ins. Co. v. Carr, 272 U. S. 414-510.

Neither can a state require a foreign corporation to surrender any of its constitutional rights as a condition of its admittance or of the continuance of its right to do a local business.

"Indeed, the cases referred to were concerned in various forms with the identical questions here involved, and authoritatively settled that the states are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce, as a condition of permitting them to do business in the state, in violation of the Constitution" (Op. 188).

Looney v. Crane Co., 245 U. S. 184-188.

"One argument urged against our conclusion is that the relation of a foreign insurance company to the state which permits it to do business within its limits is contractual, and that by coming into the state and engaging in business on the conditions imposed it waives all constitutional restrictions and cannot object to a condition or law regulating its obligations, even though as a statute operating in invitum it may be in conflict with constitutional limitations. This argument cannot prevail in view of the decisions of this Court in well-considered cases" (Op. 517).

Hanover Fire Ins. Co. v. Carr, 272 U. S. 513-517.

The Franchise Tax Demanded of Appellee Has No Fair Relation to the Value of the Privilege Asked and Received by Appellee.

The equal protection of the laws requires that such franchise tax must have a fair relation to value of the privilege for which it is imposed. If it be arbitrary or lacks such reasonable relationship it is void.

In the Air-Way Electric case this Court said:

"The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement" (Op. . . .).

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71.

As applied to appellee and weighted by such a test, sections 105-107 of the Illinois statute require appellee to pay a franchise tax which has no fair and reasonable relation to the value of the privilege granted.

The tax is **"not limited to the part of the capital stock justly apportioned to the taxing state."**

> International Shoe Co. v. Shartel, ... U. S. ..., 73 L. ed. 411, 413.

Appellee is therefore denied the equal protection of the laws and the tax and statute, as applied to it, are void.

VI.

General Railway Signal Co. v. Virginia, and Similar Cases—Distinguished.

The appellant relies on the case of General Railway Signal Company v. Virginia, 246 U. S. 500.

That case is clearly not applicable. It involved a different kind of tax, viz., an initial or admission tax, against which the only contention made was that it unreasonably burdened interstate commerce. The State of Virginia apparently did not exact any annual franchise or license fees. The initial tax was payable at the time the foreign corporation was admitted. For lack of a more true and better basis for the tax the Court sustained an admission tax based on a scale of fees not varying directly in proportion to the authorized capital stock of the corporations

admitted, and which had a fixed **maximum** amount. The Court could not say it was a tax on the corporation's capital stock which represented property and business in several states as it did not vary in direct proportion to that stock, and a maximum tax was fixed; which there and in the case of Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 34 Sup. Ct. R. 15, L. ed. 127, tended to keep down the amount of the tax which was paid by the contesting corporations; while in this case the scale of **minimums** tends to raise the amount which would otherwise have been paid by appellee.

In those cases no question of discrimination voiding the tax under the equal protection of the laws clause was raised by the parties or considered by the Court.

In this connection the Court is familiar with the rule that questions (particularly constitutional questions), not specifically raised and urged, will not be considered or passed on by the Court.

> James W. Lusk, Receiver, v. Botkin, 240 U. S. 230;
> Chic. I. & L. Ry. v. Hatchett, 228 U. S. 559.

And persons not adversely affected by the particular operation of a statute, by reason of which its unconstitutionality is charged, cannot raise the point.

> Roberts & Schaeffer v. Emmerson, supra.

The Court's opinion in the General Railway Signal case states:

> "It seems proper, however, to add that this case is on the borderline" (Op. 511).

The Virginia statute did not provide a fee for some corporations, measured by their property and business in the state, and a fee for others, measured by their issued capitalization, thereby discriminating between such two classes of corporations.

The General Railway Signal Company case holds only that an entrance fee of $1,000.00, exacted of a foreign corporation for privilege of doing a local business, standing alone, is not a direct tax on interstate commerce and was not, under the circumstances, so arbitrary as to amount to an unreasonable burden on interstate commerce.

Appellant also relies upon the language in the case of Baltic Mining Co. v. Mass., 231 U. S. 68, 34 Sup. (Ct. R. 15, 58 L. Ed. 134), where the Court sustained a Massachusetts statute which levied an annual franchise of one-fiftieth of 1 per cent on the stock of foreign and domestic corporations, with the proviso that in no case should the tax exceed the sum of two thousand ($2,000.00) dollars. The maximum therein fixed was held to save the statute, as it limited or diminished the amount of the tax to a certain **maximum**. It is a very different thing in operation to section 107 of the Illinois statute, which acted to increase the tax by fixing a scale of **minimums**. This par-

ticular difference between the two types of statutes was pointed out by your Honors in the case of Looney v. Crane Co., supra, where, with reference to the limitation on the amount of the tax (by reason of which the tax was sustained in the Baltic Mining Company case) it was said:

> "In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution, which was found to exist, resulted from particular provisions contained in each of them, which so qualified and restricted their operation, and necessarily their effect, as to lead to such result: A. These conditions related to the subject matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied."
>
> Looney v. Crane Co., 245 U. S. 178 (Op. 190).

The Illinois statute therefore does not possess the saving quality of the Massachusetts statute involved in the Baltic Mining Co. case or the Virginia statute involved in the General Railway Signal Co. case. It acts directly opposite to the Massachusetts statute. The Massachusetts statute decreases or limits "the amount of the tax authorized, when a much larger amount would have been due upon the basis upon which the tax was apparently levied," viz., 1/50 of 1 per cent of the corporation's capital (if 1/50 of 1 per cent amounted to more than $2,000.00, the tax was nevertheless limited to that sum). The Illinois

statute increases "the amount of the tax * * * which would have been due upon the basis upon which the tax was apparently levied," viz., 1/20 of 1 per cent of that portion of the corporation's stock represented by its property and business in Illinois. If 1/20 of 1 per cent did not amount to the minimum fixed by section 107, the amount of the tax was raised to that minimum.

The case of Cheney Bros. v. Massachusetts, 246 U. S. 147, involved the same statute and the same principles as the Baltic case.

The cases of Kansas City, Ft. S. & M. Ry. Co. v. Kansas, 240 U. S. 227; K. City, M. & B. R. R. v. Stiles, 242 U. S. 111; Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50, are clearly distinguishable on the grounds that the complaining corporations were **domestic corporations** which received from the taxing states the right (among others) to be a corporation.

> "Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the state court. We take it to be simply a tax on the privilege of being a corporation—on the primary corporate franchise granted by the state. The authority of the state to tax this privilege, or franchise, has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power."
>
> Kansas City, Ft. S. & M. Ry. v. Botkin (Kansas), 240 U. S. 230 (Op. 232).

"The tax is not of the character condemned in Western Union Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. Rep. 190, and kindred cases. In the latter case a tax of large amount was imposed upon a foreign corporation engaged in interstate commerce for the privilege of doing local business within the state. Under the circumstances therein disclosed and the character of the business involved, this Court held that the statute was, in substance, an attempt to tax the right to do interstate business, and to tax property beyond the confines of the state, and was therefore void. Here a franchise tax is levied upon a corporation consolidated under the laws of the state by its own acceptance of that law in incorporating under it."

Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111 (Op. 118).

The case of Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, involved only the question of the manner of computing the proportion of the foreign corporation's stock represented by property and business in Illinois; the Court holding that the aggregate amount of interstate sales effected from the company's place of business in Illinois was properly included as business done in Illinois; such inclusion affecting interstate commerce only incidentally and indirectly; saying:

"Taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed" (Op. 294).

In that case the Illinois statute was not attacked on the same grounds as was the Ohio statute in the case of Air-Way Elec. Co. v. Day, viz., that a tax on part of the corporation's unissued stock acted to deprive it of the equal protection of the law, etc. If the question had been raised, then, in view of the subsequent action of the Court in the Air-Way case, a different result would have been reached. The Supreme Court of Illinois, after sustaining this statute in

American Can Co. v. Emmerson, 288 Ill. 297;
Hump Hairpin Co. v. Emmerson, 293 Ill. 389;
Armstrong v. Emmerson, 300 Ill. 54,

later, when the equal-protection-of-the-laws objection was called to its attention, held the statute to be invalid.

O'Gara Coal Co. v. Emmerson, supra.

This most aptly illustrates appellant's error in calling attention to a certain statute and then stating that the Court sustained the statute without setting forth the specific questions raised and considered by the Court.

The case of Hump Hairpin Co. v. Emmerson is similar on principle to three other cases cited by appellant, namely:

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113;
U. S. Glue Co. v. Oak Creek, 247 U. S. 321;
Peck v. Lowe, 247 U. S. 165,

which hold only that an income tax levied on the net income of a foreign corporation earned within the state (a part being earnings on interstate commerce), is not a direct or (in those cases) an unreasonable burden on interstate commerce. An income tax on the gross income earned by such corporation in interstate commerce would be a direct burden, and hence void.

In Postal Tel. Co. v. Adams, 155 U. S. 688, cited by appellant, this Court held that, in lieu of property taxes on telegraph lines, a state could exact the equivalent thereof in the form of a franchise tax.

In the case of Cudahy Packing Co. v. Hinkle, 278 U. S. 460, this Court considered and held violative of the commerce and due-process clauses, a statute of the State of Washington, which exacted of foreign corporations, admitted to that state, an annual franchise tax based on a scale of minimum amounts graduated and limited, as was the scale of the Virginia statute considered in the General Railway Company case.

VII.

The United States Circuit Court of Appeals Did Not Misconceive the Nature and Effect of the Tax.

On page 21 of his brief, appellant quotes an excerpt from the opinion of the Circuit Court of Appeals in this case. This excerpt was contained in the opinion before rehearing; after rehearing, the following was substituted:

"In short, it offered to pay 5 cents on each $100.00 of that part of its capital stock which was ascertained by applying said section 105."

See the opinion as published in 30 Fed. Rep. (2d Series) 322, at 323.

That the Court correctly understood the nature and effect of the tax, is clearly indicated by the whole of the opinion.

Furthermore, the **Judgment**, not the reasoning of the Court, is the matter here for review.

VIII.

For the foregoing reasons, appellee respectfully insists that the judgment of the Circuit Court of Appeals for the Seventh Circuit, reversing the judgment of the United States District Court for the Southern District of Illinois, should be affirmed.

Respectfully submitted,

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APPENDIX A.

All references are to

Chapter 32, Cahill's Revised Statutes 1927;
Chapter 32, Smith-Hurd Revised Statutes 1927.
Section numbers are identical in both volumes.

Sec. 80. **Certificate of Authority to Do Business—Requirement as to Payment of Capital Stock.**—Each foreign corporation organized for pecuniary profit (except banking, insurance, building and loan and surety companies), not now licensed to do business in this state, shall, before it transacts any business or maintains an office in this state, procure a certificate of authority therefor from the Secretary of State. No certificate shall issue to any foreign corporation authorizing it to transact business in this state until the same amount is paid on each share of stock issued or to be issued as is required of like corporations organized under the laws of this state.

As amended by L. 1927, p. 354, approved and in force May 12.

Sec. 81. **——Filing Application With Secretary of State—Contents.**—A foreign corporation desiring a certificate of authority hereunder shall file in the office of the Secretary of State:

(1) A copy of its charter duly authenticated by the proper officer of the state or country where it is incorporated;

(2) A statement verified by its president and secretary or other officer setting forth:

(a) The name of such corporation and the location of its principal office or place of business without this state,

and the location of the proposed principal office or place of business in this state;

(b) The names of the states in which it has qualified to do business under the corporation laws thereof;

(c) The character of business which it intends to carry on in this state;

(d) An itemized estimate of the amount of tangible property to be employed by it in the state during the first year next after the date on which it shall be licensed and begin to do business in this state;

(e) An estimate of the total amount of the capital to be employed by it in this state and an estimate of the total amount of capital to be employed by it elsewhere during such year, itemized as follows:

(1) The value of patent rights, licenses, franchises, trade-marks, secret processes, copyrights and good will.....$.....

(2) Contracts or choses in action.....$.....

(3) Merchandise, raw materials and goods in process of manufacture.....$.....

(4) Book accounts and notes.....$.....

(5) Machinery and real estate.....$.....

(6) Stock in other corporations and securities .....$.....

(7) Furniture, fixtures, stationery and like articles .....$.....

(8) Cash in bank.....$.....

(9) Kinds and amount of other personality (personalty) .....$.....

(f) An estimate of the annual business to be transacted by the corporation everywhere.

(g) An estimate of the annual business to be transacted at or from places of business in Illinois;

(h) The name and address of some person permanently residing in this state, upon whom, as the resident agent of the corporation until his successor shall have been appointed, service of legal process may be had, and the names and addresses of the officers and directors;

(i) Such other information touching the property and business of the corporation as the Secretary of State may require;

In the case of telegraph, telephone, cable, railroad or pipe line corporations, in addition to the itemized estimate of the total amount of capital to be employed in this state, there shall be given the total length of such telephone, telegraph, cable, railroad or pipe line, and the length of the line located in this state and the total value of such line and the value of such line in this state.

Sec. 92. **Revocation of Certificate of Authority to Do Business—Grounds.**—The certificate of authority of a foreign corporation, subject to the provisions of this act, may be revoked by the Secretary of State:

(1) Upon failure of an officer, director or manager, to whom interrogatories are propounded, to answer the same fully and to file such answer in the office of the Secretary of State within thirty days after the mailing of the same;

(2) If such corporation is transacting no business in Illinois and has no tangible property in this state;

(3) If the answer to interrogatories propounded by the Secretary of State discloses, or if the fact is otherwise ascertained, that the proportion of the capital stock of such corporation represented in this state is greater than the amount theretofore paid upon by such corporation and the deficiency in such fees is not paid within thirty days of the receipt of a notice sent by mail to the president and secretary, or to the statutory agent of such corporation of record in this state, or to the attorney filing the interrogatories for such corporation, or is not paid within such extension of time as may be granted by the Secretary of State;

(4) Upon failure of such corporation to keep on file in the office of the Secretary of State duly authenticated copies of each instrument amending its charter;

(5) Upon failure of such foreign corporation to appoint and maintain an agent in this state upon whom service of legal process may be had;

(6) Upon failure, neglect or refusal to file an annual report as required by this act, or upon failure, neglect or refusal to pay the franchise tax assessed against it on or before the thirty-first day of July of the year in which such franchise tax becomes due and payable;

(7) Upon failure, neglect or refusal to file a certificate of issuance of stock and the payment of the fees required by this act.

As amended by L. 1927, p. 354, approved and in force May 12.

Sec. 94. **Unlicensed Foreign Corporation Doing Business in State—Actions and Suits by—Penalties—Recovery.**—No foreign corporation doing business in this state without a

license shall be permitted to maintain any suit at law or in equity in any of the courts of this state upon any demand, whether arising out of contract or tort; and all such corporations shall be liable by reason thereof to a penalty therefor of not less than two hundred and fifty dollars nor more than one thousand dollars, to be recovered in any court of competent jurisdiction, in a civil action to be begun and prosecuted by the Attorney-General.

Sec. 96. **Incorporation Fee—Increase of Capital—No-par-value Stock, Basis of Fee—Public Utility Corporations.**—The Secretary of State shall charge and collect an initial fee of one-twentieth of one percentum upon the amount of the capital stock which the corporation, has issued or it proposes to issue at once, but in no case shall such fee be less than twenty dollars, and a like fee of one-twentieth of one percentum upon filing a certificate of any subsequent issue or increase of capital stock and in addition thereto the same fee as that required for filing other certificates of amendment. In the event that the corporation has capital stock of no-par value, its shares, for the purpose of fixing the fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares. Each public utility corporation, including railroads, shall pay to the Secretary of State the same fees as are required to be paid for incorporation by other corporations organized for pecuniary profit.

As amended by L. 1927, p. 354, approved and in force May 12.

Section invalid as against foreign corporations, prior to amendment (O'Gara Coal Co. v. Emmerson, 326—18).

Sec. 101. **Foreign Corporations—Fees for Certificate of Authority—On Increase of Stock—On Extensions, Consolidations, Mergers, Amendments—Basis of Fees—Where Capital Stock Without Par Value.**—Each foreign corporation for pecuniary profit, other than an insurance company or building and loan company, in addition to the annual franchise fees and taxes hereinafter provided, shall pay to the Secretary of State for its certificate of authority to do business in Illinois the same fees provided by this act to be paid by a similar corporation incorporated under the laws of this state. Each foreign corporation heretofore or hereafter admitted to do business in this state, shall also pay for increases in the amount of capital stock represented in Illinois, for extensions of existence, consolidations, mergers and for filing amendments the same fees required to be paid by corporations organized under the laws of this state. All such fees shall be based upon the proportion of its issued capital stock represented by business transacted and property located in Illinois. Whenever it shall appear that the amount of capital stock represented in Illinois is greater than the amount theretofore paid upon by any foreign corporation, such corporation, before it shall continue to transact business in Illinois, shall pay to the Secretary of State upon such excess the same fees that a domestic corporation must pay upon an increase in capital stock equal to the amount of such excess.

If a foreign corporation has a capital stock of no-par value, its shares, for the purpose of estimating the amount of fees and taxes to be paid hereunder, shall be taken and considered at the amount of the consideration re-

ceived or to be received by such corporation for such shares.

As amended by L. 1927, p. 354, approved and in force May 12;
Invalid prior to amendment (O'Gara Coal Co. v. Emmerson, 326—18;
Validity of earlier act. (See American Can Co. v. Emmerson, 288—289.)

Sec. 102. **Annual Reports—What Corporations Required to Make—Time for Making—Contents—Verification—Publication of List of Reporting Corporations—Copy to Recorder of Deeds.**—Each corporation, including railroads, domestic and foreign, other than homestead associations, building and loan association[s], banks, religious corporations, insurance companies, and corporations not for pecuniary profit, shall make a report in writing to the Secretary of State between the first day of February and the first day of March of each year on forms to be prescribed and furnished by the Secretary of State. That part of the annual report relating to property and business shall be made as for the calendar year ending December thirty-first preceding (except in case the corporation keeps its accounts on the basis of a fiscal year not identically with the calendar year it shall make report for the fiscal year next preceding February first of the year in which such report is made. The other information required in such report shall be given as of the date of execution of such report. In case the corporation has not been in existence a year it shall furnish the Secretary of State the information required for the period since it was incorporated or admitted. Such report shall give the address of the corporation, officers and directors in this state by street and number. Such annual report shall also dis-

close such facts as are necessary to enable the Secretary of State to ascertain the proportion of its capital stock represented by business transacted and tangible property located in this state, and such other information as may be necessary or appropriate in order to assess the annual license fee or franchise tax. Such report shall be verified by the oath of the president, vice-president, secretary, assistant secretary or treasurer of the corporation, but in case the corporation is in the hands of an assignee, receiver or trustee then such report shall be signed and verified by such assignee, receiver or trustee.

The Secretary of State shall on or before the 15th day of January of each year forward to each corporation of record in his office a copy of the forms to be used in making the report specified in this act, but the failure to send or to receive such forms shall not relieve the corporation from the duty of making such report.

The Secretary of State shall publish on or before September first of each year a list of corporations filing an annual report in accordance with the provisions of this act, with the names and addresses of the president and secretary of domestic corporations or the agent for service of legal process of foreign corporations, and shall furnish a copy thereof to each Recorder of Deeds.

As amended by L. 1921, p. 365, June 11, July 1.

Sec. 105. **Annual License Fee or Franchise Tax—Amount—Minimum—No-par-value Stock.**—Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this state or admitted to do business in this state, and required by the act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of

five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no property or business in this state.

In the event that the corporation has stock of no-par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

As amended by L. 1921, p. 365, June 11, July 1; L. 1923, p. 280, May 3; L. 1927, p. 354, approved and in force May 12.

The 1927 amendment carried an emergency clause, as follows:

Sec. 2. Whereas, the Supreme Court of this state has held that certain sections of the General Corporation Act, which based the fees on the authorized capital stock, are unconstitutional as to foreign corporations;

Whereas, under the decision of the Supreme Court the Secretary of State will not be able to collect the fees from corporations to which the state is entitled and further, that all of the annual franchise tax provisions of said act are in danger of being invalidated unless said sections are amended, and,

Whereas, the Secretary of State is, under the provisions of section 112 of the aforesaid act, obliged to mail notice between the first day of February and the fifteenth day of May, in writing, to each corporation against which a franchise tax or fee is assessed, notifying such corporation of the amount of franchise tax or fee assessed against it for the year next ensuing, commencing on July first, and,

Whereas, unless this act becomes effective on or before May fifteenth the state will lose the fees from corporations to which the state is justly entitled;

Therefore, an emergency exists and this act shall take effect and be in full force from and after its passage.

Following is the emergency clause of the 1923 amendment:

Sec. 2. Whereas, at time of passage of the present "The General Corporation Act" of this state conferring upon corporations the privilege of having shares without a par value, it was the intent of the Legislature at that time as a prerequisite to the right of the corporations to enjoy such privilege that in all cases and under all circumstances that such corporations should pay for such privilege the same amount of initial fee and franchise taxes or fees as though such shares were of the par value of one hundred dollars ($100) per share; and

Whereas, it was thought that the Legislature had made this intent perfectly clear in the original act as passed; and

Whereas, the Supreme Court of this state has held that the Secretary of State cannot regard the shares of no-par value for the purpose of assessing the franchise taxes or fees as of the par value of one hundred dollars ($100) per share and require the corporation to pay a franchise tax of five cents (5c) on each share of no-par value since the following words were omitted from section 105 of the aforesaid act, to wit:

"In the event that the corporation has stock of no-par value, its shares, for the purpose of fixing such fee, shall be considered to be of the par value of $100 per share," and

Whereas, Under the decision of the Supreme Court, the Secretary of State will not be able to collect large sums of money from corporations to which the state is justly entitled, and further that all of the annual

franchise tax provisions of the aforesaid act are in danger of being invalidated unless this omission is remedied; and

Whereas, The Secretary of State is, under the provisions of section 112 of the aforesaid act, obliged to mail notice between the first day of February and the fifteenth day of May, in writing to each corporation against which a franchise tax or fee is assessed, notifying such corporation of the amount of franchise tax or fee assessed against it for the year next ensuing, commencing on July first; and

Whereas, That unless this act becomes effective on or before May 15, that the state will lose large sums of money due from corporations and to which the state is justly entitled, therefore, an emergency exists and this act shall take effect and be in full force from and after its passage.

This section was also amended in identical terms by L. 1923, p. 281, approved April 12, but probably owing to the invalidity of the emergency clause in the amendment of April 12, 1923, it was expressly repealed by the act of May 3,1923, amending the section.

Section does not deny due process nor impair obligation of contracts (Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50, 46 S. Ct. 375; see, also, Roberts & Schaefer Co. v. Emmerson, 313—137).

Section invalid as to foreign corporations (O'Gara Coal Co. v. Emmerson, 326—18).

Sec. 106. **Ascertainment of License Fee or Franchise Tax in Case of Corporations Generally.**—In ascertaining the amount of the issued capital stock represented by business transacted and property located in this state, the sum of the business of any foreign or domestic corporation transacted in this state and the total property of such corpora-

tion located within this state shall be divided by the sum of the total business of the corporation, and the total property of the corporation wherever situated.

As amended by L. 1927, p. 354, approved and in force May 12.

Sec. 107. ——**Basis in Case of Corporation Without Property in State and Doing No Business in State—Where Stock of No-par Value.**—In case it appears from the annual report that the corporation has no property located in this state, and is transacting no business in this state, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having issued capital stock of more than $50,000, but not exceeding $200,000, shall pay an annual fee of $15; corporations having issued capital stock of more than $200,000, but not exceeding $500,000, shall pay an annual fee of $20; corporations having issued capital stock of more than $500,000, but not exceeding $1,000,000, shall pay a fee of $50; corporations having issued capital stock of more than $1,000,000, but not exceeding $10,000,000, shall pay a fee of $200; corporations having issued capital stock of more than $10,000,000, but not exceeding $20,000,000, shall pay a fee of $500; and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.

In the event that the corporation has stock of no-par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

As amended by L. 1927, p. 354, approved and in force May 12.

Sec. 108. When Franchise Tax Payable.—The franchise tax herein provided to be paid shall be due and payable on the first day of July of each year and shall be the franchise tax for the year commencing on the first day of July in which it is due and ending on the thirtieth day of June next thereafter.

Sec. 109. **Assessment of Tax From Annual Report—Corporations Organized Between January 15 and March 1.**—The Secretary of State shall, from the annual report filed, assess a tax at the rates herein prescribed against each corporation required herein to make an annual report.

The Secretary of State shall from the best available information also assess such tax on all corporations organized or admitted between the fifteenth day of January and the first day of March.

As amended by L. 1921, p. 365, June 11, July 1.

Sec. 112. **Notice of Amount of Franchise Tax—Contents —Failure to Receive.**—Between the first day of February and the fifteenth day of June, of each year, the Secretary of State shall mail a notice in writing to each corporation against which a tax is assessed, notifying such corporation of the amount of the franchise tax assessed against it for the year next ensuing, commencing on July first, and the amount found by the Secretary of State to be due upon an increase of capital stock of a foreign corporation represented in this state, and that objections, if any, to such assessment will be heard by the officer making such assessments, upon request by corporation on a day not later than the twenty-fifth day of June provided upon proper showing to the Secretary of State that the failure to request a hearing before that date was due to

the absence or sickness on the part of some officer of the corporation, the Secretary of State may grant a hearing after that date. Such notice shall further state that the tax herein assessed is payable to the officer making the assessment on July first after the date of the notice. The notice required by this section shall be mailed to the corporation addressed to its post-office address, as shown by the records in the office of the Secretary of State. A failure to receive the notice mentioned in this section shall not relieve a corporation of the obligation to pay the annual franchise taxes nor shall it invalidate the assessment of the tax.

As amended by L. 1921, p. 365, June 11, July 1; L. 1927, p. 354, approved and in force May 12.

Sec. 113. **Collection of Assessment.**—It shall be the duty of the officer making the assesment to collect the same.

Sec. 114. **Delinquent Corporations—Penalty.**—If the franchise tax assessed in accordance with the provisions of this act shall not be paid on or before the thirty-first day of July, it shall be deemed to be delinquent, and there shall be added a penalty of five per cent for each month or part of month that the same is delinquent, commencing with the month of August.

Sec. 115. **Franchise Taxes and Penalties a Prior Lien—Record of Taxes, Penalties and Costs.**—The franchise taxes assessed under this act, together with penalties, interest and costs that shall accrue thereon, shall be a prior and first lien on the real and personal property of the corporation from and including the first day of July of the year when such franchise taxes should have been paid until the same have been paid.

The Secretary of State shall make and keep in his office a record showing the name of each corporation against which a franchise tax has been assessed, the amount assessed against each corporation, together with penalties and costs, if any, and the date when paid, and a notation of any and all proceedings taken for the collection of the franchise tax.

Sec. 116. **Collection of Delinquent Franchise Taxes and Penalties—Procedure.**—In case any corporation shall fail, refuse or neglect to pay the franchise tax assessed against it on or before the thirty-first day of July, the Secretary of State shall issue a warrant, under his hand and official seal, directed to the Sheriff of any county in the state, commanding him to collect and return such franchise tax and penalties. It shall be the duty of the Sheriff receiving such warrant to levy upon and sell the personal property of such corporation to satisfy such franchise tax and penalties, together with the legal costs and charges of such Sheriff. Upon the receipt of such warrant the Sheriff shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of courts of record, and shall be entitled to the same fees for the execution of the warrant, to be collected in the same manner. After proceeding in the manner prescribed, the Sheriff shall make the proper and necessary notations, of the amounts collected, upon the warrant and promptly return it to the Secretary of State within ninety days from the date of issuance thereof, with the amount of franchise tax and penalties collected by him, if any.

As amended by L. 1921, p. 365, June 11, July 1.

Sec. 128. **Payment of Franchise Tax and Fees as Condition to Doing Business or Maintaining Suits.**—No corporation required to pay a franchise tax or fee under the laws of this state shall transact any business in this state or maintain any action at law or suit in equity, unless such corporation shall have paid such franchise tax, or such fees and penalties when the same become due and payable until such franchise taxes, fees and penalties have been paid in full.

As amenedd by L. 1921, p. 365, June 11, July 1.

Sec. 129. **Annual Franchise Taxes.**—In addition to all other fees required by law to be paid, the Secretary of State shall collect in advance from corporations subject to a franchise tax, annual franchise taxes as follows:

(1) If a corporation is organized, or admitted to do business in this state, or its capital stock issued or increased;

(a) Between July first of any year (after the year 1919), and September thirtieth of the same year a franchise tax equal to the full amount of the annual franchise tax;

(b) Between October first of any year (after the year 1919) and December thirty-first of the same year a franchise tax equal to three-fourths of the annual franchise tax;

(c) Between January first of any year and the last day of February of the same year, a franchise tax equal to one-half of the annual franchise tax;

(d) Between March first of any year and June thirtieth of the same year, a franchise tax equal to one and one-third of the annual franchise tax.

The franchise tax required by paragraphs "a," "b" and "c" shall be for authority of the corporation to carry

on its corporate business until the thirtieth day of June following the date of payment of such tax. The franchise tax required by paragraph "d" of existing corporations increasing their capital stock shall be for authority of the corporation to employ its increased capitalization in this state until the thirtieth day of the second June following, but such corporation shall still be liable to pay its annual franchise tax upon its old capital stock in July following in the same manner as required of other corporations not increasing their capital stock. The fees required in this section shall be based upon the percentum of issued capital stock as evidenced by latest annual report required to be filed under the provisions of this act, if any.

The word "between," as used in this section, shall include both dates specified.

As amended by L. 1921, p. 365, June 11, July 1; L. 1927, p. 354, approved and in force May 12.

Sec. 130. ——**In Addition to Other Licenses or Taxes.** —The annual franchise taxes imposed by this act shall be in addition to any specific licenses or taxes imposed by law upon such corporation for the privilege of carrying on its business, or upon its franchise or property.